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No. 86-818

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

FALCON INSURANCE COMPANY

and

MUTUAL FIRE, MARINE AND INLAND INSURANCE COMPANY,
Petitioners,

v.

ELI LILLY AND COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

THEODORE R. BOEHM *
CHRISTOPHER G. SCANLON
JOHN R. SCHAIBLEY, III
BAKER & DANIELS
810 Fletcher Trust Building
Indianapolis, IN 46204
(317) 636-4535
Counsel for Respondent

* Counsel of Record

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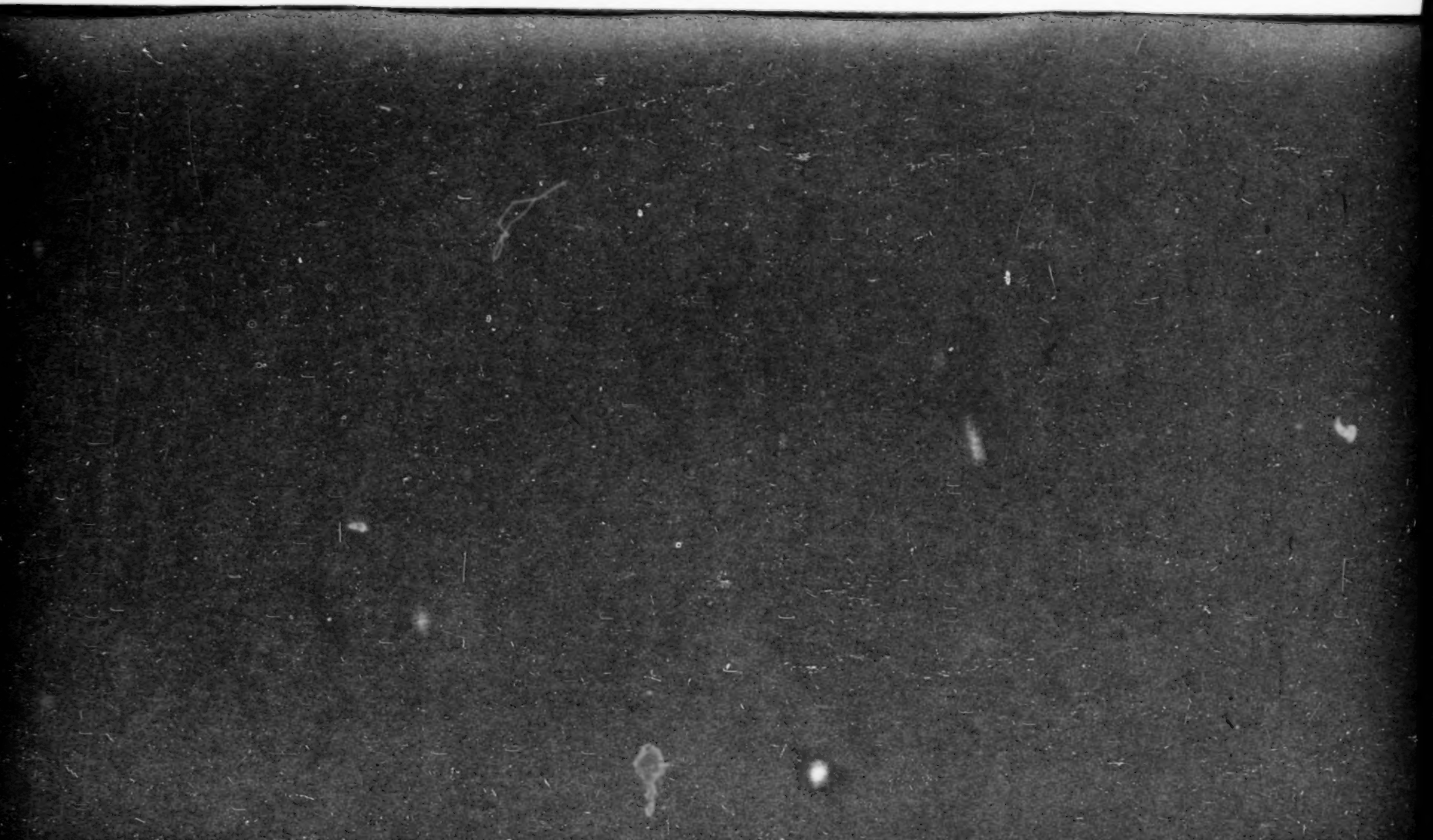

QUESTIONS PRESENTED

1. Did petitioners consent to suit in the forum of respondent's choice?

2. Is the fact bound issue whether petitioners' contacts with the forum are such that they should have reasonably anticipated being haled into court there worthy of this Court's review?

LIST OF PARTIES

Respondent Eli Lilly and Company was plaintiff-appellee below, urging affirmance of the district court's judgment. Pursuant to Rule 28.1, respondent states that it has no parent company, non-wholly owned subsidiary, or affiliate corporation. The petitioners, defendants-appellants below, are listed in the Petition for a Writ of Certiorari at ii, along with information regarding petitioners' parents, affiliates and subsidiaries.

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STATUTES

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully urges the Court to deny the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 24, 1986.

OPINIONS BELOW, JURISDICTION AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts petitioners' statement as to opinions below, jurisdiction, and constitutional and statutory provisions involved.

STATEMENT OF THE CASE

This is a declaratory judgment action filed by Respondent Eli Lilly and Company ("Lilly") against over one hundred insurers seeking a single uniform judicial resolution of a dispute between, and among, those carriers and Lilly as to how Lilly's standard product liability insurance applies to claims arising from the sale of one of its nationally distributed pharmaceutical products.

Petitioners are two among many insurers who issued excess liability policies to Lilly. As is common in the excess lines insurance business, the policies issued by the two petitioners are "following form" policies. Rather than setting forth detailed provisions regarding the terms and conditions governing the insurance agreement, these policies adopt the terms and conditions of the policies of the underlying carriers.

Falcon Insurance Company ("Falcon") issued three policies to Lilly during the years 1960-68. Each of the policies was issued on the same form and each incorporated by reference the terms and conditions of an underlying initial layer policy issued by Lloyd's Underwriters. Both the terms and conditions of each of Falcon policies and the underlying Lloyd's policies contain agreements by the insurer to submit to the jurisdiction of any court of competent jurisdiction in the United States.

Mutual Fire, Marine and Inland Insurance Company ("Mutual Fire") issued Lilly one policy containing its own consent-to-suit clause which is the same as the Falcon clauses for these purposes.

Both petitioners insured Lilly against liability arising from the manufacture, sale or use of Lilly's products. At the time of issue of each policy, Lilly's products were distributed, sold and used all over the United States, including the District of Columbia. Moreover, three product liability cases (including one involving 12 plaintiffs) were pending against Lilly in the District of Columbia

at the time these insurers filed their motion to dismiss and one other was pending at the time this lawsuit was filed. Companies that write excess coverage are generally not required to be licensed (but could constitutionally be required to be licensed) in the jurisdiction. Neither Falcon nor Mutual Fire is licensed in the District of Columbia. Both Falcon and Mutual Fire report premiums attributable to the District.

Petitioners moved to dismiss on grounds of lack of jurisdiction over their persons. The district court was persuaded that petitioners had contractually consented to suit and denied petitioners' motion without written opinion. On appeal, petitioners challenged the district court's holding on the consent-to-suit provisions in their policies and further argued that assertion of personal jurisdiction violated the Due Process Clause. With respect to Mutual Fire, the Court of Appeals concluded that a perceived condition precedent to the consent-to-suit clause had not occurred. With respect to Falcon, the Court of Appeals determined that resolution of the consent to suit issue would require further determinations by the district court. As to both, however, the Court of Appeals held that a remand was unnecessary because personal jurisdiction was properly and constitutionally exercised under the District of Columbia Long Arm Statute. Applying the test for determining the due process limits of the exercise of personal jurisdiction enunciated in *World-Wide Volkswagen Corp. v. Woodson* to the facts of this case, the court held that the assertion of personal jurisdiction over the defendants comported with the requirements of due process.

On the record before it, the court also held that both petitioners engaged in transactions in the District to such an extent that the District could constitutionally require them to be licensed in the District, and hence were "doing business" in the District under 28 U.S.C. § 1391(c). Pet. App. at 22a-23a. Petitioners do not challenge the venue holding in this Court.

SUMMARY OF ARGUMENT

No constitutional issue is presented by this case. Petitioners contractually consented to suit in the forum of Lilly's choice. Application of the minimum contacts test was therefore not even required in the case.

In any event, this case presents merely the application of well-settled principles of law to the facts of this particular case. The issue is whether the relationship among the insurers, the forum, and the litigation was such that under traditional notions of fair play and substantial justice, the insurers should have reasonably anticipated being haled into the District of Columbia courts. This is an intensely fact bound inquiry and does not warrant this Court's review. Petitioners present no special or important reasons for this Court to exercise its discretionary certiorari jurisdiction in this case. The Court of Appeals' judgment correctly concludes that these excess insurers, by contracting to insure risks within the District of Columbia, are subject to that forum's exercise of personal jurisdiction to adjudicate the scope of coverage that their policies provide. That conclusion is correct and not at all novel.

Finally, no live controversy affecting the substantive rights of the parties remains; only further delay is at stake.

REASONS FOR DENYING THE WRIT

I. THESE INSURERS HAVE CONSENTED TO SUIT IN THE DISTRICT OF COLUMBIA

A. The Consent To Suit Constitutes A Waiver Of Any Objection To Personal Jurisdiction

Both Mutual Fire and Falcon issued policies to Lilly that contain, or expressly incorporate by reference, standard "consent-to-suit" clauses.[1] It is well settled that per-

[1] Petitioners' assertion that the Court of Appeals concluded that the consent-to-suit clauses "provided no basis for personal jurisdiction over petitioners," Pet. at 5 n.2 is misleading. The Court of

sonal jurisdiction is a personal right that may be waived. Such a waiver is effective if accomplished by contract before any suit is filed. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (slip op. at 9-10 n.14); *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964). Under the terms of the insurers' policies, the carriers have consented to jurisdiction in any court chosen by the insured.

The consent-to-suit clauses are dispositive of the insurers' objections to personal jurisdiction here. Pursuant to those clauses, the insurers submit themselves to the jurisdiction of any "court of competent jurisdiction" in the United States selected by the insured.[2] They contractually obligated themselves to take whatever steps are necessary to comply with any of the requirements necessary to give the court jurisdiction.[3]

Appeals rejected petitioners' arguments that the clauses did not cover in personam jurisdiction. Pet. App. at 18a. Moreover, with respect to Falcon, the Court believed that it was simply not possible to determine on the basis of the record before it whether the clause was applicable, indicating that it would remand the issue if it were not affirming on another ground. As to Mutual Fire, the Court held that Mutual Fire's refusal to take a specific position on the coverage provisions of its policies did not constitute a repudiation of its liability. The Court viewed such a repudiation as a condition precedent of the consent-to-suit clause. Mutual Fire has since been presented with a dollar claim and has not paid, thereby "repudiating," in Lilly's view more than is necessary.

[2] Both carriers are bound by the following contractual provision:

> It is agreed that in the event of the failure of the Insurer(s) hereon to pay any amount claimed to be due hereunder, Insurer(s) hereon, at the request of the Insured, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

[3] Below, Mutual Fire and Falcon argued that the term "competent jurisdiction" required in personam jurisdiction without refer-

Falcon and Mutual Fire raised the issue of a "condition precedent," arguing that until they fail to honor a dollar-claim from Lilly, Lilly could not invoke the clause. Both carriers anticipatorily repudiated their obligations to Lilly—indeed, if there had not been such an anticipatory repudiation, there would be no issue of coverage to litigate on the merits. There clearly was such an issue.[4] Lilly and Mutual Fire and Falcon, together with the other insurers, litigated the issue of coverage. Mutual Fire and Falcon should not be heard to say that they have not repudiated their liability to Lilly, while at the same time litigating the issue of their liability to Lilly for the past five years.

The alleged "condition precedent" of the insurers' consent to suit is "the failure of the insurer(s) hereon to pay any amount claimed to be due hereinunder . . . ." What Lilly claims to be due under the policy is any amount of Lilly's damages for products liability claims (up to the policy limits) which are covered by these insurers under Lilly's interpretation of the policies. The insurers have expressly repudiated their obligation to pay such claimed amount, and hence the "condition precedent" has occurred. The issue of what amounts are due under these particular policies is simply a question on the merits, and has nothing to do with personal jurisdiction. Lilly paid premium dollars for the right to choose the forum in which to litigate those questions on the

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ence to the consent to suit clause. The Court of Appeals properly rejected the argument.

[4] Petitioners herein and others have petitioned for certiorari on the merits of the coverage issue in *The Home Insurance Company, et al. v. Eli Lilly and Company*, No. 86-822 (Pet. for Cert. filed Nov. 20, 1986).

merits, and that should be the end of the personal jurisdiction issue in this case.[5]

Mutual Fire's refusal to take an affirmative position on the meaning of the coverage provision at issue in this litigation should not be equated with a non-repudiation of liability. The Court of Appeals noted that in answers to interrogatories, Mutual Fire asserted that its interpretation of the policies differed from that advanced by Lilly without revealing Mutual Fire's view of the meaning of the policy. But whatever interpretation is secretly embraced by Mutual Fire, it must be materially different than that advanced by Lilly. If it is not, then Mutual Fire is simply engaged in bad faith litigation.

Moreover, a party should not be permitted to assert the failure of a condition precedent by simply taking a litigation position which raises the mere possibility that the condition has not occurred. At bottom, Mutual Fire's position is that when an insured notifies it of claims and the insured's position on how such claims are to be handled, when the insurer disputes the insured's position, it has not repudiated its obligation. The insurer cannot assert his own failure to take a substantive position on the grounds for its repudiation as a failure of a repudiation condition precedent.[6]

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[5] Indeed, in supplemental proceedings now ongoing in the district court, Mutual Fire, along with other insurers as to whom Lilly has made a dollar-demand for payment, are litigating questions concerning the payment of the amounts due Lilly under the policies and other claim specific matters.

[6] In addition to the consent-to-suit clause discussed above, Mutual Fire's policy also provided:

> "Further, pursuant to any statute of any state, territory or district of the United States which make provision therefor, the Insurer(s) hereon hereby designate the superintendent, commissioner or director of insurance or other officers specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be

B. Mutual Fire's Stipulation Has Waived Its Personal Jurisdiction Defense

Mutual Fire has stipulated that it "agrees to be bound . . . by whatever final order is entered" in this action as to The Home Insurance Company, the issuer of the first tier policy underlying its excess policy. Stipulation dated July 5, 1983. Appendix. That stipulation constitutes a waiver of its personal jurisdiction argument.[7]

A personal jurisdiction objection can be waived at any point in the proceedings below, and a stipulation by a party previously asserting personal jurisdiction as a defense providing that the party will be bound by the Court's judgment, waives the personal jurisdiction issue. *See Petrowski v. Hawkeye-Security Insurance Co.*, 350 U.S. 495 (1956) (per curiam) (reversing 226 F.2d 126 (7th Cir. 1955)).[8]

This Court reviews judgments, not statements in opinions. *E.g., Black v. Cutter Laboratories*, 351 U.S. 292,

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served any lawful process in any action, suit or proceeding instituted by or on behalf of the insured or any beneficiary hereunder arising out of this contract of insurance. . . ."

Falcon's policies contain a similar provision.

[7] The agreement to be bound by the judgment in this case also renders the personal jurisdiction issue essentially moot as to Mutual Fire.

[8] In the *Petrowski* case, the Court of Appeals held that there was a lack of personal jurisdiction, ordering dismissal of the case. The dissent pointed to a number of stipulations by the insurance company in which the insurance company agreed to be bound by the judgment of the court. In reversing the judgment of the Court of Appeals, this Court held that the stipulations, under which the insurance company agreed to be bound by the judgment of the court, precluded resurrection of the personal jurisdiction issue. While the language of one of those stipulations did expressly mention personal jurisdiction, this Court observed that the other stipulations as well supported its conclusion that the insurer had waived the personal jurisdiction issue.

297 (1956). The judgment of the Court of Appeals that there was personal jurisdiction over these insurers was correct. Indeed, no constitutional issue is presented by this case because the insurers consented to suit in the forum of Lilly's choice. Under fundamental principles of constitutional adjudication, this Court "will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). In this case, the constitutional issue should not even be reached because the insurers contractually consented to jurisdiction.

II. ASSERTION OF PERSONAL JURISDICTION WOULD NOT OFFEND DUE PROCESS EVEN IF PETITIONERS HAD NOT EXPLICITLY CONSENTED

Petitioners do not challenge the Court of Appeal's holding that the District of Columbia Long Arm Statute, D.C. Code § 13-423(a) (1981 & Supp. IV 1986) provides for personal jurisdiction over petitioners in this case because they contracted to insure risks within the District of Columbia. Rather, petitioners argue that the Due Process Clause renders application of that statute void in this case.

This issue turns on well known doctrine. It has long been settled that where, as here, the adequacy of notice is not at issue,

> "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted).

Whether maintenance of this suit against the petitioners in the courts of the District of Columbia offends tra-

ditional notions of fair play and substantial justice ultimately requires determining the "reasonableness" or "fairness" of requiring a corporation to defend a particular suit in a particular forum. Under well-settled doctrine, the following factors are to be considered:

> "[T]he burden on the defendant . . . will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, see *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); the plaintiff's interest in obtaining convenient and effective relief, see *Kulko v. California Superior Court, supra*, 436 U.S., at 92, at least when that interest is not adequately protected by the plaintiff's power to choose the forum, cf. *Shaffer v. Heitner*, 433 U.S. 186, 211, n. 37 (1977); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies . . . ." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

Each of these factors demonstrates the reasonableness of the assertion of personal jurisdiction in this case. The forum, through its long arm statute, has specifically expressed an interest in adjudicating contracts to insure any risk within the District of Columbia at the time of contracting. Moreover, Lilly's interest (and indeed the interest of the petitioners themselves) in obtaining convenient and effective resolution of a controversy and the interstate judicial system's interest in obtaining the most efficient resolution of controversies are manifest. Petitioners seek multiple and duplicative litigation in several forums; indeed, petitioners' pursuit of this issue is economically irrational unless inefficiency and its attendant delays are their only goals.

The doctrine to be applied has been often revisited. A central question is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."

World-Wide Volkswagen, 444 U.S. at 297. "Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *International Shoe*, 326 U.S. at 319. Moreover, when a corporation purposely avails itself of the privilege of conducting activities within the forum state, it should reasonably anticipate being haled into court there. *World-Wide Volkswagen*, 444 U.S. at 297. And as this Court has squarely held in *Calder v. Jones*, 465 U.S. 783, 788 (1984), a plaintiff's contacts with the jurisdiction "may be so manifold as to permit jurisdiction when it would not exist in their absence."

The Court of Appeals correctly applied these well established principles to the facts of this particular case.[9] In this case, "the plaintiff is the focus of the activities of the defendant out of which the suit arises. See *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957)." *Calder v. Jones*, 465 U.S. at 788. Lilly's cause of action arises from the insurers' "commercial transactions in interstate commerce" with Lilly. *See Kulko v. Superior Court of California*, 436 U.S. at 97. These insurers "purposefully derive[d] benefit from activities relating to" the District of Columbia, *id.* at 96, and clearly derived "commercial benefit" from insuring risks within the District of Columbia. *Id.* at 100. The District of Columbia long arm statute rests on the entirely reasonable premise that insuring risks in the District affects conduct in the

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[9] "Like any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present. . . . [T]his determination is one in which few answers will be written 'in black and white. The grays are dominant and even among them the shades are enumerable.'" *Kulko v. Superior Court of California*, 436 U.S. 84, 93 (1978) (citations omitted).

District. To put it another way, Lilly's tort liability in the District *is* the defendants' liability in the District. These insurers do not and cannot dispute the fact that they were aware of Lilly's nationwide business. And they intentionally and purposefully insured the risks posed by Lilly's products distributed in all of those jurisdictions.

In the context of this case these factors are particularly forceful. The underlying carriers and most excess carriers are all indisputably subject to jurisdiction and venue in the District of Columbia. These two excess carriers agreed to insure the same risks as primary insurers. That in itself avails petitioners of benefits and protection of the law wherever the first tier policy is in litigation. Moreover, a contrary rule simply encourages multiple suits to resolve the same controversy.

Petitioners' analogy to the facts of *World-Wide Volkswagen* simply does not wash. Unlike the automobile in *World-Wide Volkswagen*, the presence of Lilly's products in the District of Columbia was in no sense "fortutious" and petitioners' assumption of the risk posed by those products in the District of Columbia or elsewhere is in no sense involuntary. The petitioners' *business* is the assumption of just such risk. Petitioners entered into a "carefully structured" relationship with Lilly that envisioned "wide reaching contacts" with Lilly on a nationwide basis. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (slip op. at 17). Petitioners are perfectly free to "structure their primary conduct" with assurances as to where that conduct will render them liable to suit. *See World-Wide Volkswagen*, 444 U.S. at 297. Petitioners have consciously decided to issue excess product liability insurance for products marketed nationwide.[10] Petitioners are free to issue different kinds of

[10] Moreover, their form policies contain consent-to-suit clauses in the forum of the insureds' choice, providing jurisdiction even in those forums that do not assert long-arm jurisdiction to the limits of due process, and in other forums preventing needless litigation of meritless challenges to jurisdiction on due process grounds.

insurance policies, or issue policies to local enterprises. In view of their primary conduct as professional risk takers, to accept petitioners' position that they cannot reasonably anticipate suit where their customers whom they have indemnified are subject to suit is to blink at reality.

Petitioners' reliance on *Rush v. Savchuk*, 444 U.S. 320 (1980), is equally misplaced. In *Rush*, a state attempted to exercise quasi in rem jurisdiction over an individual who had no forum contacts by attaching the contractual obligation of an insurer to defend and indemnify him in connection with the suit. The Court held that the relationship of the insurer to the state did not provide a basis for asserting personal jurisdiction over the individual policyholder. The purpose of the insurance policy, of course, was to reduce the risk of the insured, not to increase it by subjecting him to suit in additional jurisdictions. Moreover, the insurance policy was "not the subject matter of the case. . . ." *Id.* at 329. In short, it was unfair to attribute the insurer's contacts with the forum to the hapless policyholder. The insured had bargained under his automobile insurance policy to shift *his* risks to the *insurer*, not to have the insurer's risks shifted to him. In the instant case, of course, the situation is just the reverse. The subject matter of the case is the insurance policy, and the risk taker is merely being asked to assume the risk it consciously and voluntarily assumed.

Moreover, petitioners surely reasonably had to expect that if Lilly was sued in the District it was likely to attempt to implead petitioners if a dispute arose over their duty to indemnify or pay defense costs. Such a dispute has arisen, and while the full scope of the dispute transcends the particular lawsuits which have thus far been filed against Lilly in the District of Columbia, the "issue is personal jurisdiction, not choice of law." *Keaton v.*

Hustler Magazine, Inc., 465 U.S. 770, 778 (1984) (quoting *Hanson v. Denckla*, 357 U.S. 235, 254 (1958).[11]

Petitioners, in the form of premiums, purposefully obtained benefits from Lilly as a result of its national activities. They now seek to avoid the risks they knowingly assumed. The consequences of their repudiation of their agreement to indemnify Lilly affect Lilly in the District of Columbia and on a nationwide basis.

> "[W]here individuals 'purposeful derive benefit' from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be weilded as a territorial shield to avoid interstate obligations that have been voluntarily assumed. And because 'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,' it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes related to such activity. *McGee v. International Life Insurance Co.*, ..." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (slip op. at 11).

The insurers should not be permitted to cast aside their obligations voluntarily assumed.[12]

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[11] Petitioners' only answer on this point is the assertion that impleader of these petitioners by Lilly was impossible because there has been no refusal by petitioners to indemnify Lilly. Pet. at 11, n.5. The question, however, is personal jurisdiction, not the merits of the parties' various contractual arguments. Petitioners certainly had to reasonably foresee the possibility that they would be haled into court in the District of Columbia in one of the foreseeably many products liability actions which might be filed against Lilly in the District. Once impleaded, they could of course argue that under the policies they were not substantively liable, but that would have nothing whatever to do with the court's jurisdiction over their person to determine such substantive legal questions.

[12] Given that standard form business liability insurance contains consent-to-suit clauses, and that liability issuers do reasonably

Finally the insurers' contention that the decision below conflicts with the holding of the Supreme Court of Pennsylvania in *United Farm Bureau Mutual Insurance Co. v. United States Fidelity & Guarantee Co.*, 501 Pa. 646, 462 A.2d 1300 (Pa. 1983) rests on a misreading of the Pennsylvania decision. The court struck down the assertion of personal jurisdiction in that case because of its conclusion that the "policies inherent in federalism would not permit [its] legislature to require a totally foreign insurance company, such as United Farm, to provide no fault insurance to its policyholders." *Id.* at 1307. The issue, thus, was the extraterritorial assertion of the substantive law of the State of Pennsylvania, and the court simply reasoned that because the substantive basis of the lawsuit against the defendant was invalid, the courts of the commonwealth could not reqiure the defendant to defend such an unconstitutional action. *Id.* Indeed, the court expressly stated, albeit in *dictum*, that "traditional notions of fair play and due process would *not* be offended by requiring United Farm [the insurer] to defend [its insured] in our courts," because United Farm should have foreseen the possibility of a suit against the insured in its courts. *Id.* at 1307 (emphasis added). Hence, the Pennsylvania case does not deal with the issue presented here.

In closing, Lilly submits that the outcome on the personal jurisdiction issue will not affect the substantive rights of the parties and hence is of limited interest to them. Because a grant of this petition for certiorari would cause additional, needless delay, Lilly has filed this

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anticipate and engage in national litigation, the constitutional issue seldom arises regarding such insurance. The decision below is consistent with the only other decisions dealing with this issue. *Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *American and Foreign Insurance Association v. Commercial Insurance Co.*, 575 F.2d 980 (1st Cir. 1978). No question of general importance is presented by this case.

brief. However, even if the Court of Appeals had ruled against Lilly on the personal jurisdiction issue, the issue on the merits between Lilly and these parties was nevertheless resolved in the case below. If the petitioners fail to recognize that, Lilly can bring suit where petitioners have conceded jurisdiction is proper and move for summary judgment. That, of course, would spin wheels for no useful purpose. At bottom, that is precisely what petitioners seek.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

THEODORE R. BOEHM *
CHRISTOPHER G. SCANLON
JOHN R. SCHAIBLEY, III
BAKER & DANIELS
810 Fletcher Trust Building
Indianapolis, IN 46204
(317) 636-4535
Counsel for Respondent

* Counsel of Record

December 20, 1986

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0669
Judge Norma Holloway Johnson

ELI LILLY AND COMPANY,
Plaintiff

v.

THE HOME INSURANCE COMPANY, *et al.*,
Defendants

STIPULATION

It is hereby stipulated and agreed between counsel for plaintiff and counsel for defendant Mutual Fire, Marine and Inland Insurance Company that

a) such defendant agrees to be bound as to each of its own policies of insurance issued to plaintiff by whatever final order is entered in this declaratory judgment action as to the triggering language of those policies of insurance of other carrier defendants (see Schedule B to Plaintiff's Motion for Summary Judgment, filed March 31, 1983) that underlie and govern each policy of the defendant as shown on Attachment A to this Stipulation;

b) such defendant will not be obligated to respond to any discovery requests or other pretrial filings or motions made by plaintiff;

c) such defendant shall not seek discovery from plaintiff or make any request requiring decision or approval by the Court on any matter that could affect plaintiff's interests after the effective date hereof.

d) notwithstanding Paragraphs "b" and "c" above, defendant shall remain a party herein and be served with all filings and other communications required to be served on parties by the Federal Rules of Civil Procedure.

/s/ Richard H. Gimer
Richard H. Gimer
M. Stuart Madden
Waltraut S. Addy
SANTARELLI & GIMER
2033 M Street, N.W.
Suite 700
Washington, D.C. 20036
Attorneys for Defendant
Mutual Fire, Marine & Inland Insurance Company

/s/ Peter C. Ward
Peter C. Ward
Michael A. Nardolilli
BAKER & DANIELS
Suite 600
1920 N Street, N.W.
Washington, D.C. 20036

Theodore R. Boehm
Christopher G. Scanlon
BAKER & DANIELS
810 Fletcher Trust Building
Indianapolis, Indiana 46204
Attorneys for Plaintiff
Eli Lilly and Company

SO ORDERED:

/s/ Norma Holloway Johnson
Norma Holloway Johnson
United States District Judge

DATE: July 5, 1983

ATTACHMENT A

Insurer	Policy Number (Lilly No.)	Governed By Company/Policy No. (Lilly No.)
Mutual Fire, Marine and Inland Insurance Company	CN 500528 (75-5)	Home HEC-44-29-972 (73-1)